BANK DEPOSITS AND COLLECTIONS.[1]

INSOLVENCY, no less than natural death, is a tragedy which comes into the midst of business transactions, fixing the claims of parties, and calling for the application of legal principles to determine the nature and extent of their rights. Perhaps no business relationship is more frequent than that of banker and customer or depositor. And while insolvency of banking institutions is happily less frequent than in the ordinary business, it is not so uncommon that questions therein are not often in the courts for adjudication. It would, therefore, be a natural deduction that the legal principles applicable should be comparatively certain, and the rights of bank depositors subject to automatic adjustment when occasion arises. However, a short time spent in looking into the books and cases shows that not only are the decisions at great variance, and the jurisdictions at wide points of difference, but a confusion of thought exists as to the proper principles to be applied. Certainty is essential, and it seems imperative that some general principles should be established to meet the questions which come from the incidence of insolvency at various stages in the completion of the transaction. It will be presently attempted to look into some of the many cases on a particular class of these transactions to see if some principles cannot be deduced upon which to rest a greater certainty of statement of rule.

Men make bank deposits every business day, in funds, drafts, notes, cheques and other negotiable securities. But if asked to define their exact legal rights at the moment their deposit is handed over the counter, or immediately thereafter, or some days after, the answers would be widely different, ranging from the view repre-

[1] The questions arising out of bank collections, seem to the writer to be capable of grouping into three classes. The business of collection, as conducted by banking institutions of today, involves a highly specialized form of agency. The first question, therefore, which arises in any case, is whether the transaction between the parties has resulted in the creation of this relationship. If it be determined that it has done so, the next, and second, line of inquiry is, what are the mutual rights, duties and obligations of the parties involved? How long does this relation continue? What ends it and what follows it? When these questions are disposed of, a third point, which is really a collateral matter, may arise, namely, What are the rights of the principal against third persons, whether bankers or not, into whose possession the paper or its proceeds may pass in the course of completing the collection?

The discussion of all these points would require a very considerable space. The present inquiry will, therefore, be directed only to the first question indicated, whether the bank and customer have entered into an agency relation, and if not, what relationship have they assumed?

sented by the statement "my money is in the bank,"[2] to that of the depositor who does not consider the matter at all because he has implicit faith in the soundness of the bank. Not only does this difference of view exist among the classes of society represented by depositors, but it may be hazarded that bankers, as a class, entertain almost as widely differing views of the same problem. A glance at the printed notices, (commonly thought to represent the terms of the contract of deposit), which appear in pass-books, discloses a great variety of wording, sometimes intended to insure the establishment of one relation and sometimes another, but in many cases of like intent essential differences appear. This uncertainty of depositor and banker, is, of course, the reflection of the uncertainty in the cases, and improvement in the latter should bring about a corresponding improvement in the understanding of the situation by the parties. There is encouragement in contemporaneous statements like the following: "Gradually by repeated litigation and consequent adjudication, this law is becoming well defined."[3]

The particular problem to be here considered is that which arises where, after a bank deposit of money, or paper, either the bank of deposit or some other bank or individual into whose hands the money or paper subsequently passes, has become insolvent. It is to be noted that if paper is deposited, it may be time paper, or matured, sight, or demand paper; it may be drawn on the bank of deposit or upon another bank; it may be sold to the bank in effect, the title passing out of the depositor, or it may be merely turned over to the bank for the particular purpose of being collected from the drawee, whether this bank or another.

The problems litigated in this connection may be separated into two main divisions. The one deals with the relation created when the deposit is made. This is a part of the law of contract. The other deals with the consequential rights and obligations of the parties, flowing from the possible relations which may be assumed on the deposit. Not only are there these principal divisions, but the latter must be considered from the standpoint of the rights of the depositor against the bank, and against third persons, whether other banks or individuals.

THE RELATION CREATED BETWEEN DEPOSITOR AND BANK.

Bank deposits are not all of one kind. The corporate powers of banking institutions, whether incorporated under the National Bank

[2] Grant, Banking (6th Ed.) p. 3.
[3] 1912, McMaster's Commercial Cas. 8a.

Act,[4] or under the several state banking systems, include, generally speaking, the complete right of the bank to receive deposits made in any of the usual methods desired by business men.[5]

Special deposits for safe keeping, of money;[6] of chattels or quasi-chattels;[7] of commercial paper for the sole purpose of presentment for acceptance;[8] deposits to be held actually in trust;[9] and, subject to particular incorporation acts, a savings bank department;[10] all these are proper banking transactions. There seems to be little doubt that the law governing the rights of the special depositor, is reasonably well settled, and that it is adequate to his protection if the bank subsequently becomes insolvent. Upon that event, he is entitled to the return of his property in specie.[11] The property has

[4] Act of Congress, 1864, c. 106; 18 Stat. at L. ch. 343; a bank organized under this Act, inter alia, may purchase and discount notes, Danforth v. National State Bank (1891) 48 Fed. 271, 3 U. S. App. 7; make collections, Mound City Paint Co. v. Commercial Nat. Bank (1886) 4 Utah 353; Emmerling v. First Nat. Bank, (1899) 97 Fed. 739; receive deposits, Bushnell v. County Nat. Bank (1877) 10 Hun. 378; Board of Supervisors v. Munson (1909) 157 Mich. 505; including special deposits, First Nat. Bank v. Graham (1879) 100 U. S. 699.

[5] The grant of the power to engage in a banking business alone carries with it the various primary and incidental powers which are customarily exercised in that business. These powers are defined in many decisions and really constitute a part of the law merchant. They are the subject of judicial notice. Bank of Australia v. Breillat (1847) 6 Moore, P. C., 152, 173; Mortgage Co. v. Tibballa (1884) 63 Iowa 468, 19 N. W. 319. The express grant of power in distinct terms in the charter or act is necessary only to give rights which would fall outside this customary power, or, on the other hand, to deny a power usually included therein. 1 Morse, Banking (4th Ed.) § 47; First Nat. Bank v. Graham (1875) 79 Pa. 106.

[6] Foster v. Essex Bank (1821) 17 Mass. 479; Dawson v. Real Estate Bank (1841) 5 Ark. 283, 297. "A special deposit is the placing of something in the custody of the bank, of which specific thing restitution must be made." 1 Morse, Banking (4th Ed.) § 190.

[7] Nat. Bank v. Flanagan (1895) 129 Mo. 178; 31 S. W. 773.

[8] Van Wart v. Wooley (1824) 3 B. & C. 439; Bank of Van Dieman's Land v. Bank of Victoria (1871) L. R. 3 P. C. 526.

[9] Bank of the State v. Burton (1867) 27 Ind. 426; Lebanon Bank's Est. (1895) 166 Pa. 622, 31 Atl. 33.

[10] State v. People's Nat. Bank (1908) 75 N. H. 27, 70 Atl. 542. A National Bank is not a savings bank in the ordinary sense, though it is within its corporate power to conduct a savings bank department. Deposits therein are not held in trust, but on contract creating the debtor and creditor relation.

[11] So long as the subjects of the special deposits are kept separate, as they should be, and so are capable of identification, they may be reclaimed. The bank is a mere bailee and without title; its creditors cannot, therefore, have any rights thereto. Capital Nat. Bank v. Coldwater Nat. Bank (1896) 49 Neb. 786, 69 N. W. 115; Vail v. Newark Savings Institution (1880) 32 N. J. Eq. 631. It is only when such deposits are mingled with the general assets of the bank that more difficult questions arise. In order to recover his property, the special depositor must identify it in its original or converted form, and if impossible to do this, many courts have denied him a preference over the general creditors, Vail v. Newark Savings Institution, supra; Illinois Tr. Co. Case (1883) 21 Blatchf. 275. Other courts are more lenient and will allow the preference where the depositor can show that the assets which went into the hands of the receiver or comptroller were increased by his property. Spokane Co. v. First Nat. Bank (1895) 68 Fed.

remained his, and never vested in the bank. The latter is but a bailee, usually for hire, though possibly without any express charge for the particular transaction, especially if the depositor is a regular and valued customer.[12] This law is simply a part of the law of bailments; the bank is the *locator operae* of the Roman law.[13] The subject of the transaction may even be money, and yet the bank remains a mere bailee for the customer throughout,[14] or perhaps may be termed an agent or quasi-trustee,[15] provided the contract between the customer and the banker contemplates that the very money deposited is to be restored coin for coin, and the latter agrees to such a singular transaction.[16] The grant of general banking powers

979 (trust imposed on the cash but not the other assets); Davenport Plow Co. v. Lamp (1890) 80 Iowa 722; Harrison v. Smith (1884) 83 Mo. 210 (as to all the assets); Peak v. Ellicott (1883) 30 Kans. 156 (irrespective of whether it can be shown that the property passed into the hands of the receiver); Continental Bank v. Weems (1888) 69 Tex. 489.

[12] Morse, Banking (4th Ed.) § 215.

[13] Jones, Bailm. 96; 2 Kent, Com. 591; Story, Com. (2nd Ed.) §§ 442-456.

[14] State v. Clark (1853) 4 Ind. 316; Keene v. Collier (Ky. 1858) 1 Met. 415; Parker v. Hartley (1879) 91 Pa. 465.

[15] Foley v. Hill (1848) 2 H. L. Cas. 28; Warren v. Nix (1911) 97 Ark. 374, 135 S. W. 896. In the latter case, Frauenthal, J., says, "If the agreement between the parties is that the identical coin or currency shall be laid aside and returned, then it is a special deposit. But if the agreement is that the money shall be returned, not in the specific coin or currency deposited, but in an equal sum, it is a general deposit."

[16] A common business transaction, which may be termed a specific deposit, creates a different situation. In the case stated in the text, the identical money is to be returned, and the liability of the bank is for negligence in safe keeping, First Nat. Bank v. Zent (1883) 39 Ohio 105, and as to its servants it acts under the usual doctrine of respondeat superior, Foster v. Essex Bank (1821) 17 Mass. 479; Scott v. Nat. Bank of Chester Valley (1874) 72 Pa. 471; cf. Leach v. Hale (1870) 31 Iowa 69. But suppose that A, being liable on a note about to mature, deposits in B Bank the amount thereof, with directions to take up the note. Usually this will be done before the note is due, or if afterward, unless B is itself the holder, some short time will necessarily be consumed before the directions can be carried out. (If B is the holder, the note will have been paid, and the matter at rest.) With respect to this money, what is the relation existing between A and B during this interval? Suppose B fails before paying the note, will A be entitled to a preference for the amount, or be allowed to prove only with general creditors?

Different courts have taken different views of this matter, some under reasoning that cannot be supported. In Kansas it is held that, during this time, the relation of principal and agent, or cestui and trustee, is created, and not that of creditor and debtor; that it is a trust fund, and on failure of B, may be recovered in full against the general creditors, even in the absence of evidence that the money passed into the hands of the receiver. Peak v. Ellicott (1883) 30 Kans. 156, 1 Pac. 499; Ellicott v. Barnes (1884) 31 Kans. 170, 1 Pac. 767. This is followed in New York, State v. City Bank of Rochester (1884) 96 N. Y. 32. The view of these cases is, that the bank is not entitled, during the interval of time that must elapse, to mingle this money with the general assets, but that the above facts, without evidence of special agreement to do so, impress upon the bank the obligation to keep the funds separately, and that it is therefore, a special deposit and not assets for general creditors. The New York case goes far: there only the customer's cheque on his account with the bank was handed to B, with directions to use the proceeds to pay his note. B charged the account with the amount of the cheque and did nothing more before its failure. Danforth, J., said it

also includes the right to receive specific deposits, in which money or a chose is placed with the bank for a particular purpose other than that of safekeeping and return in specie. Thus a deposit of commercial paper or a bond to be collected, or of money to pay an acceptance on maturity, are specific deposits. The latter has just now been discussed and the conflict pointed out with respect to the

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was "a specific appropriation of a particular fund for the payment of the claim." He held that it was not proper for the bank to mingle these funds with its general assets or to fail to separate them, having charged off the cheque, and that B was a bailee or trustee of the proceeds, though it nowhere appeared that any part of the assets of the bank had been set aside as the proceeds. Relying upon these cases, the same conclusion was reached in Kimmel v. Dickson (1894) 5 S. D. 221, 58 N. W. 561, the court saying, "The bank could not afterwards, without the acquiescence of A, change its relation to him from that of a bailee or trustee to that of a general debtor. We apprehend that no different principle is involved because one of the parties happens to be a bank." This is, of course, true if the original relation established was trustee and cestui. Anderson v. Pacific Bank (1896) 112 Cal. 598, 44 Pac. 1063, and Lebanon Bank's Assigned Estate (1895) 166 Pa. 622, 31 Atl. 33, have frequently been treated as being in accord with this view, but in fact, both are distinguishable; in the California case, the money was deposited as collateral security for a bail bond and the receipt given clearly intended the return of that particular money; in the Pennsylvania case, the bank had been appointed a technical trustee of an estate and, as such, had wrongfully mingled the money with its own property.

In other cases, A has been held entitled to rank only as a general creditor, Assigned Estate of Brandywine Bank (Pa. 1882) 1 Chester Co. 431, where A made the deposit to be applied in the payment of a bond, and before this was accomplished, B assigned for creditors. It was held that A was entitled only as a general creditor, and could not even claim the rank of a depositor under a state act fixing an order of preferences. In City of St. Louis v. Johnson (1897) 5 Dill. 241, Judge Dillon reaches the same conclusion, but upon somewhat uncertain reasoning. Moreland v. Brown (1898) 86 Fed. 257, accord. In re Barned's Banking Co., Ltd. (1870) 39 L. J. Ch. 635, is the leading authority on the subject, and holds that A is entitled to no preference, but merely to be allowed to prove with the general creditors.

Farley v. Turner (1857) 26 L. J. Ch. 710, was distinguished in the case last cited, and properly so. There, B had, after once mingling the funds with its own, and before insolvency, separated the amount therefrom, and forwarded it to an agent in London to pay the note, thereby re-impressing on a particular subject-matter, a trust, which, failing on B's insolvency, resulted to the benefit of A.

These latter cases seem preferable upon principle and practical usefulness. No real purpose is served by compelling B to keep such funds separately. The usual course of banking business permits the bank to place funds received by it among the general assets. Useless this regular manner of dealing is altered by express and definite contract, it seems to be judicial legislation to require, even during this short time, the bank to undertake the additional annoyance and care of keeping separately money thus received. It is assumed that the bank is solvent and a going concern, and if so, it should be entitled to let this money follow the usual course, assuming, in the meantime, an absolute liability for the amount, and when it becomes possible to carry out the directions, to take a part of its general assets to make the payment, thereby discharging not only its own obligation to its customer, but that of the customer on the note. It is true the relation between the bank and the customer changes in the course of the transaction from that of debtor and creditor to trustee and cestui when the definite appropriation of a part of its assets is made to carry out the particular purpose. But there seems no real objection in this.

This is undoubtedly the view in England, and while the cases are few, there is some authority for it in this country, although the majority of American cases seem to

failure of the bank. The deposit for collection will be considered later.

Finally, the power to receive general deposits, that is, the normal banking transaction, is, *a fortiori,* within the corporate power of a regularly organized bank.

There are, then, these three kinds of deposits. The difficult question is to ascertain, in a particular case, which of them has been made. In case of the special deposit, and also of the specific deposit (except that form of it known as the agency to collect), this is not so difficult. In both cases, the bank is a bailee for the customer; in the former, it remains bailee throughout; in the latter, it may, at some subsequent time, assume the same relationship that would exist on a general deposit.

It is evident that the creation of such a relationship depends upon the will of the respective parties; like the making of any ordinary contract, there is the intention on the one side of having certain services performed, and on the other, of receiving a consideration, directly or indirectly, for performing them. While, as pointed out, the law governing the relation when once established, is reasonably clear, it is not always so simple a matter to determine whether, in a particular case, a deposit has been made within the classes enumerated above, i. e. a special or a specific deposit. However, it is believed that these transactions are so far unusual, and so much the incidental and not the principal, part of banking, that only in very rare cases will there be any real dispute on the question of fact whether the deposit is within this class. If a depositor desires this especial transaction, his mind will be so far directed toward the clear statement of his desire and intention to the banker that there is little chance of misunderstanding. But it is important to note that, in the last analysis, it is a question of contract, and hence the parties may make their contracts as they like, subject only to the

require the bank, accepting such a specific deposit, to stipulate expressly for the right to use the money with its own assets, or to keep it separately. The text writers who have discussed this point, are impressed with the soundness of the English view. 2 Morse, Banking (4th Ed.) § 567; Grant, Banking (6th Ed.) § 256. No attempt has been made, and it is believed no successful attempt could be made, to show that the English cases rest upon the simple principle of identification. On the contrary, both Vice Chancellor Kindersly and the Master of the Rolls, Lord Romilly, base their decisions on the propriety of the use of the funds by the bank in consideration of becoming an absolute debtor therefor.

There is, of course, no doubt that the bank may expressly, or even impliedly, contract to keep the money so deposited as a separate fund and thus to assume the obligations of a trustee. If a reasonable commission is charged, or if the receipt given disclosed such intention (Anderson v. Pacific Bank, supra) no doubt would arise upon the implication of such a term in the contract. But criticism may justly be levelled at the imposition of such a duty upon the bank by the bare undertaking of such commission.

usual restrictions of public policy, positive and corporate power. The issue of fact is as to the terms of the contract they have made. Some matters of evidence bearing on that issue will be considered presently.

At this time, the deposits of interest are the general deposit and the deposit for collection. It is in the latter class of banking transaction that the greatest number of problems arise, causing long and hard fought litigation.[17] The relative rights of the bank and of the depositor for collection, as they stand when the cheque is handed in, while it is in the course of collection, and after collection, are the subjects of the greatest uncertainty, but this problem is not even encountered until after an entirely different problem, of no less difficulty and uncertainty, is solved. This earlier question, which is the difficulty to be dealt with in this article, is whether a given transaction between a bank and its customer has resulted in a so-called general deposit, which is the every-day matter of handing, say, silver money or bank bills over the counter, or in a deposit for collection, wherein the bank becomes an agent or trustee of the customer to accomplish a particular object, the collection of a right to money, represented by the thing deposited. By this illustration, it is not meant to infer that only money or bank bills may be the subject of a general deposit. Almost invariably a deposit of either will be such a deposit, if not specifically made a transaction within the classes enumerated in the preceding paragraphs as special deposits, for although the bank bill of another bank represents only the right to money, yet custom, as well as law, has universally decreed that such a representative chose shall be received as money.[18] But it is not impossible, nor indeed improbable, that a cheque on the bank of deposit or on another bank, a draft or bill of exchange, a promissory note or other negotiable security, should be received upon general deposit. If so, the resulting relationship between the bank and customer is exactly the same as if the subject of deposit had been money or bank bills.[19] On the other hand, the cheque, draft or note may be

[17] It is thought that the failure of the Fidelity National Bank of Cincinnati in 1887, alone resulted in seventy-five or more cases, many of which were carried to the highest state courts, and some to the Supreme Court of the United States.

[18] Lord Mansfield said, speaking of bank notes, "They are not goods, not securities, nor documents for debts, nor are so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money, to all intents and purposes. They are as much money as guineas themselves are; or any other current coin that is used in common payments as money or cash." Miller v. Race (1758) 1 Burr. 452. Chancellor Kent, "Moneys extends to bank notes, when they are known and approved of, and used in the market as cash." Mann v. Mann's Exrs. (1814) 1 Johns Ch. 231, 236. Accord. Green v. Sizer (1866) 40 Miss. 530, 543.

deposited merely for the purpose of collection, that the bank should take proper steps to seek out the persons primarily and secondarily liable to pay the paper, and to collect payment from them if possible, or if not, to take precautions to protect fully the customer's rights in the premises, and to return the paper to him.[20] In other words, the only instance in which the agency for collection may arise is upon a deposit of paper.

In the same sense that the question whether a special or general deposit has been made is one of fact, the question whether a deposit of commercial paper is general or merely for collection is one of the same kind and solved by the same inquiries. The chief difference lies in the fact that, in the case of special deposits, being the unusual or marked transactions, the facts will appear more clearly, the parties will put their intentions into express words, while the uncertainty which has been said to prevade the ordinary bank deposit, so far surrounds the deposit of money or commercial paper in daily transactions that the parties rarely, if ever, express in any form their real intentions. On the contrary, the contract made by them must be gathered from their actions and from surrounding custom and usage, and from such written expressions as may appear. The same uncertainty and confusion of thought, makes it improbable that the parties ever intelligently recognized that they were entering into contractual relations. So, when called upon to determine their relative rights, the law must construct a contract for them out of the bare skeleton of a transaction. It seems scarcely a fair criticism that in so doing, the courts have not always been consistent nor attained uniformity.

For the better discussion of this problem, and at the same time, to consider the more difficult questions connected with the distinc-

[19] The rationale of this transaction, although rarely set forth as such by the courts or text writers, is that the bank has purchased the paper from the customer just as any private person might have purchased it, taking transfer and title by delivery and indorsement, and in payment, in effect, handing him the face value of the paper, if matured, sight or demand paper, or the discount value if it is time paper. Following this, the depositor is, in turn, regarded as having redeposited this money with the bank as if an original transaction. However, in this case, there is no actual payment of the purchase price directly and immediately to the customer, but instead, the bank places it to his credit, and becomes a debtor to him, under an obligation to pay to him or to his order on cheque.

[20] As pointed out in the beginning, no attempt will be made to define the character of duties imposed upon the bank by becoming an agent to collect, nor to determine the principles upon which such duties are determined. For present purposes, it is sufficient to say that upon insolvency of the bank while the agency subsists, the rights of the customer as owner are protected upon the principles applicable to all agents in possession of their principal's property. Nonotuck Silk Co. v. Flanders (1894) 87 Wis. 237, 58 N. W. 383. The problem is that of identifying trust property in its original or converted form. In re Hallett's Estate (1879) 13 Ch. Div. 696, 17 Harv. L. Rev. 413.

tion between a special and a general deposit, bank deposits will be considered according to their subject matter, whether of money or of paper.

DEPOSITS OF MONEY.

When money is deposited in a bank by its customer, the presumption is strong that it is a general deposit. "Whether the deposit was a general or a special one was, of course, a question of fact to be determined from the intention of the parties; but a deposit is presumed to be a general one in the absence of evidence to the contrary."[21] Thus when the depositor is a regular customer of the bank, and desires to make a special deposit, the money to remain his own, and, in case of failure of the bank, not to be assets for its creditors, he must either expressly contract for a deposit of that kind,[22] or show that the surrounding circumstances alone so sufficiently indicate that to be his intention, that the bank must accept the deposit with like understanding.[23] These matters must be reasonably clear, for with respect to a regular customer, the presumption that a general deposit is intended is especially difficult to rebut.[24] When the deposit is made by one not a regular customer, the presumption may not be so strong, but nevertheless, the courts have apparently gone far to deny the existence of a special deposit.[25] This, perhaps, represents the more modern tendency and is in accord with sound commercial, as well as economic, principles. It must always be remembered that we are dealing presumably with a solvent and going bank. Where this is true, the purposes which are to be subserved by creating a special deposit of money,[26] at least, should be made to appear clearly before the bank is saddled with the extraordinary contract which binds it to the observance, first, of its imperative duty to keep such a fund separated and dis-

[21] Nichols v. State (1894) 46 Neb. 715, 65 N. W. 704; In re Franklin Bank (1828) 1 Paige Ch. 249; State v. Dickerson (1905) 71 Kans. 769, 81 Pac. 497.

[22] Ward v. Johnson (1880) 95 Ill. 215, following Brahm v. Adkins (1875) 77 Ill. 263. In deciding this case in the lower court, it was said, "A deposit is general unless the depositor makes it special." Johnson v. Ward (1878) 2 Ill. App. 261.

[23] Dawson v. Real Estate Bank (1841) 5 Ark. 297; 2 Morse, Banking (4th Ed.) § 186.

[24] Nichols v. State, supra.

[25] State v. Dickerson (1905) 71 Kans. 769, 81 Pac. 497. In this case the depositor, a woman, stated that she did not desire a cheque book nor to become a regular depositor, but would want the money in a few days. It was held a general deposit.

[26] No difficulty arises in any case, save the deposit of money or that which passes from hand to hand as readily as money. Thus a deposit of bonds, of stock certificates, for safe keeping is beyond doubt a special deposit, and no title passes to the bank. Ex parte Eyre (1843) 1 Phil. 227; Wylie v. Northampton Bank (1883) 15 Fed. 428; First Nat. Bank v. Ocean Nat. Bank (1875) 60 N. Y. 278; Pattison v. Syracuse Nat. Bank (1880) 80 N. Y. 82; Lloyd v. West Branch Bank (1850) 15 Pa. 172.

tinct from its other cash, and second, to give, at least, ordinary and reasonable care to the protection of the separate fund.[27] Thus commercially, the special deposit imposes extra burdens upon the machinery of the bank, already a business of vast detail. Economically, the policy of such deposits is bad. They withdraw currency from useful circulation. No use can be made of money in bank on special deposit; the bank may not re-invest it and has no use from it;[28] no interest is paid on it, so the owner receives no benefit from his property but the safe keeping in idleness of money that might otherwise be of use as working capital for men who would make it earn its way, while paying normal returns to its owner.[29]

It has already been said that the evidence to establish a special deposit of money will, in the average case, and in the considerable majority of all cases, be clear and beyond question. But the mere fact that the money deposited is from public funds does not make it a special deposit; it is general and subject to the rules applicable to private deposits,[30] unless positive statutes provide otherwise.[31]

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[27] Upon the degree of care required of the bank in this transaction, see Grant, Banking (6th Ed.) 276, 1 Bolles, Banking, 440; 1 Morse, Banking (4th Ed.) § 194.

[28] Kimmel v. Dickson (1894) 5 S. D. 221, 58 N. W. 561. Interest is allowed upon failure to deliver a special deposit, only from the time of wrongful refusal. Anderson v. Pacific Bank (1896) 112 Cal. 598, 44 Pac. 1063. A special deposit may not be made the basis of an issue of bills or notes, Foster v. Essex Bank, 17 Mass. 479. It could not be used for their redemption.

[29] "(The general) deposit is deemed the most advantageous to the depositary, and most consistent with the general objects, usages, and course of business of such companies or corporations." Rinzo, C. J., in Dawson v. Real Estate Bank (1843) 5 Ark. 283, 297.

The term "special deposit" as used here is limited to mean the placing of something in the charge or custody of the bank, of which specific thing restitution must be made. However, the same name has been used, modernly, to describe any deposit which varies in but a slight degree, from the regular and every day general deposit. Thus, a deposit which bears interest has been termed a special deposit, or one which cannot be withdrawn before a specified time, or, like an attorney's account, a deposit made by one in a fiduciary capacity. 1Bolles, Banking, 435. Of course, this class of "special deposit" permits the bank to use the money, and affords a return to the depositor. It is not, therefore, open to the objections just stated. But in reality, so far as the title to the subject of deposit is concerned, these are general deposits and they will be so treated. They fall within that class under the accurate and succinct definition given by Burford, Ch. J., "A general deposit is one which is to be repaid on demand in money. A special deposit is one in which the depositor is entitled to the return of the identical thing deposited." Bank of Blackwell v. Dean (1900) 9 Okla. 626, 630.

[30] Retan v. Union Trust Co. (1903) 134 Mich. 1, 95 N. W. 1006. Act of Congress of Mar. 4, 1907 (34 stat. at L. ch. 2913, sec. 3, p. 1289) enacts that all national banks designated for that purpose by the Secretary of the Treasury, shall be depositaries of the public money of the United States. In Branch v. United States (1876) 12 U. S. Ct. of Claims 281, 287, Richardson, J., said: "When public money is deposited with a designated depositary national bank, it is not there retained in kind as the special property of the United States, of which the bank is made the custodian, but it becomes at once the property of the bank, is mingled with its other funds, is loaned or otherwise employed

However, if the public officer has no authority to make the deposit, and the bank knows its character, it seems the public may claim it as a special deposit, and the creditors cannot take the money as assets of the bank. "When, except as specially authorized by statute, a treasurer or other custodian of public money makes a general deposit thereof in his own name, a trust results to the beneficial owner, and upon the insolvency of the bank receiving such funds with notice of their character, the estate is chargeable with the full amount of the deposit to the prejudice of nonpreferred creditors."[32] The lack of official authority to make a deposit, and knowledge by the bank of the character of the funds must jointly exist, to make it a preferred claim.[33] Nor does the mere fact that the deposit is made by an executor out of the funds of the estate, make the deposit a special one, though the bank is fully aware, through its proper offi-

in the ordinary business of the corporation, and the bank, instead of being a custodian of public money, becomes a debtor to the United States, precisely as it does to other depositors on receipt of individual deposits."

[31] Idaho Rev. Codes, § 6975 (4) makes punishable by imprisonment any public officer who deposits public money in any bank otherwise than on special deposit. In State v. Thum (1898) 6 Idaho, 323, it was held that this section prevented the public money deposited from passing to the bank as upon a general deposit.

[32] State v. Midland State Bank (1897) 52 Neb. 1, 71 N. W. 1011, per Post, C. J. Accord: Myers v. Board of Education (1893) 51 Kans. 87; First Nat. Bank v. Bunting (1900) 7 Idaho 27; Green v. County (1902) 8 Idaho 721; Independent District of Boyer v. King (1890) 80 Iowa 497; Bunton v. King (1890) id. 506; Davenport Plow Co. v. Lamp (1890) id. 722. The same principle is recognized in Board of Education of Detroit v. Union Trust Co. (1904) 136 Mich. 454.

In Lucas County v. Jamison (C. C. Iowa 1908) 170 Fed. 338, the court declares these cases to be incorrect, treating them as deciding that the bare fact of a known wrongful deposit of public funds entitles a claim therefor to priority of payment over general creditors on the insolvency of the bank. Instead the priority depends not only upon the wrongfulness of the deposit and the bank's knowledge thereof, but upon the further fact that the money can be traced and shown to be part of the funds or assets at the time of the distribution. See infra, and note 39.

[33] At least, it appears essential that the bank receiving the deposit must have knowledge that it is a public fund, else it is a general deposit. In Lowry v. Polk County (1879) 51 Iowa 50, a case where the bank had not notice, Seever, J., says: "Such money became the property of West & Sons from the time it was deposited." This was affirmed in Long v. Emsley (1881) 57 Iowa 12. The same ruling seems to have been in effect, made in School District v. First Nat. Bank (1869) 102 Mass. 174. In the Iowa cases the question was not the right of the public authorities to maintain a preference against the assets of an insolvent bank, but involved the public right against the officer making the deposit without authority. In the Massachusetts case the bank was not insolvent, but claimed to hold the public funds it had received, without notice of their character, on account of an individual debt of the officer. However, Chapman, C. J., says: "The specific money became the property of the bank." If that is true, outside of the right to enforce a lien against the general deposit for the officer's debt, the question whether there is value is unimportant. Not having notice at the time of the deposit, the bank received the money as a general deposit though the officer was without authority to make the deposit. This principle was approved in Independent District of Boyer v. King, supra, relying on the cases just discussed.

cers, of the character of the deposit.[34] The same is true of a deposit made by a guardian of minors;[35] or by a judge of a court of probate.[36] The addition of the word "clerk," "attorney," "treasurer," and the like to the name of the account does not make it a special deposit, however much it may prevent the bank from claiming a lien against it for the personal debt of the depositor.[37]

All of these instances go to show that the contract of special deposit is an extraordinary one and, being so, must find its origin in extraordinary circumstances either of stipulation or of fact. It is impossible to lay down an accurate general test, but a consideration of the inherent qualities of a special deposit will aid in determining whether one was contemplated. It is an essential part of such a transaction that the parties should mutually understand that the identical property, whether chattels or coins, is to be returned by the bank. If that is true, the deposit is special; if not, it is, perhaps in all cases, general. Clearly in the above instances, the parties did not intend that result. In view of this, the cases holding a wrongful deposit of known trust funds to be from the beginning, a special deposit, and recoverable in toto, upon failure of the bank, are not strictly correct. The *ratio decidendi* should be that the deposit is a fraud on the public or *cestui* as owner, in which the bank wrongfully participates, and, therefore, if solvent, the bank is liable in tort, or if it has benefited, the tort may be waived, and suit brought in assumpsit.[38] But the wrongdoer and the bank did not contemplate keeping the funds separated, and, in fact, that will not be found to have been done. It is improper, therefore, to speak of it as a special

[34] Officer v. Officer (1903) 120 Iowa 389, 94 N. W. 947. Even in such a case, the court must determine, as a preliminary question, whether the executor is authorized to make a deposit. For if it is a wrongful deposit by him, and the bank has notice of the character of the funds, the claim should be given a preference. However, it is proper for an executor to deposit funds of the estate in banks of good standing and reputed solvency, Barney v. Saunders (1853) 16 How. 535, 14 L. Ed. 1047; King v. Talbot (1869) 40 N. Y. 76, provided the deposit is made to the trust account, and not in his individual name, Jacobus v. Jacobus (1883) 37 N. J. Eq. 17; Corya v. Corya (1889) 119 Ind. 593, 22 N. E. 3; which would be in itself a conversion of the funds according to some authorities, Ivey v. Coleman (1868) 42 Ala. 409.

[35] Paul v. Draper (1900) 158 Mo. 197, Brace, P. J.—"The fact that the deposit was of a trust fund, and known to the bank to be such, would not of itself make the bank a trustee of the fund for the benefit of the cestui que trust (minors). There must have been something in the circumstances of the deposit to constitute it a special, as contradistinguished from a general deposit."

[36] Alston v. State (1890) 92 Ala. 124, 9 So. 732.

[37] Otis v. Gross (1880) 96 Ill. 612, 36 Am. Rep. 157; McLain v. Wallace (1885) 103 Ind. 562; Fletcher v. Sharpe (1886) 108 Ind. 276; McAfee v. Bland (Ky. 1889) 11 S. W. 439.

[38] Compare Bank of Columbia v. Patterson's Admr. (1813) 7 Cranch 299; Green v. Sizer (1866) 40 Miss. 530.

deposit, as many courts have done,[39] or, in all cases, to give the public a preferred claim if insolvency occurs. It is true a private person, whose agent has wrongfully given up his property to another in collusion, may avoid that transaction and recover the property so long as he can identify it, even against creditors of the fraudulent and insolvent possessor. So may the public. But upon what principles is the public to be given a preferred claim in the insolvency of a bank receiving a known wrongful deposit of public funds, where no proper identification of the property can be made? A private *cestui* must trace his property; so should the public beneficiaries.[40]

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[39] Supra, note 32.

See Lucas County v. Jamison, supra. The better authority seems to be that there is no preference to a political subdivision, as such, by common law. Idem; Chosen Freeholders v. State Bank (1877) 29 N. J. Eq. 268, affirmed in 30 N. J. Eq. 311; annotation to Page County v. Rose (1906) 130 Iowa, 296, 106 N. W. 744, in 8 Am. Ann. Cas. 114 (see for authorities): Case Notes, 5 L. R. A. N. S. 886, 16 L. R. A. N. S. 918.

The question properly is one of tracing one's own property. The Iowa cases cited in Note 33 are not clear whether they give such a preference to the public, as such, irrespective of the following of the property into the hands of the receiver, or whether they proceed upon the theory of tracing the funds. If the former, they appear opposed to the weight of authority; if the latter, they are doubtful in view of the more general rule that "property, to be recovered, must be clearly traced and shown to reside in the assets at the time when they are being distributed." Lowe v. Jones (1906) 192 Mass. 94, 78 N. E. 402, 7 Am. & Eng. Ann. Cas. 551. If that is possible the right becomes a preferred charge upon the entire mass. Frelinghuysen v. Nugent (C. C. 1888) 36 Fed. 229. It is a question of fact not carefully considered in the Iowa cases, provided they can be said to rest upon this basis. The same may be said of cases in Oklahoma, Cherry v. Territory (1906) 17 Okla. 213 and 221; Watts v. Commissioners (1908) 21 Okla. 231, 95 Pac. 771.

In any view, it cannot be called a special deposit from the outstart. At best the knowing of the bank in the fraud only makes the transaction, which would otherwise be a general deposit, voidable as such by the beneficial owner of the funds, and until that is done it can hardly be called a strict special deposit. When avoided, title revests in the original owner, and the question is: where is the property to which he has title? There must be a period during which at least a voidable title was vested in the bank. However, the results are identical Whether thus considered, or treated as special deposit, the problem is the same, can the property owned be now identified, either in the original or converted form? Richardson v. New Orleans & Co. (1900) 102 Fed. 780, 42 C. C. A. (5th Cir.) 619, 621.

[40] The ease with which the public has succeeded in many cases may perhaps be attributed to the unwarrantable extensions made in some American cases, of the rule in Knatchbull v. Hallett (1879) 13 Ch. D. 696, as in Peak v. Ellicott, supra, and Barnes v. Ellicott, supra. See 17 Harv. Law Rev. 413.

An unfortunate practice of doubtful banking honesty, has given rise to a line of cases wherein the public has been preferred upon the failure of a bank in which public funds have been deposited. Many of the statutes authorizing public officers of municipalities to deposit the money in their charge in accredited banking institutions, require that the award of the deposit shall be made to the highest bidder. Not infrequently the banks of the community will permit one of their number to succeed in such a contest without real competition, on the promise of the selected one to redeposit a part of the funds so received with the others, and to draw thereon only when, and in proportion to, the public withdrawals. In such a case, it has been, so far as the writer is aware,

For those cases then, in which the parties have not made their contract in clear and express terms, although they are now respectively alleging or denying a special deposit, we may say a general test does exist, which, if not wholly satisfactory in all cases, does, at least, define the issue with preciseness. Futhermore, by way of supplemental assistance in construing the parties' contract, certain generalizations are possible to point out what does not, of necessity, make a special deposit. These guides, with the rule that all deposits of money are presumed to be general, will, it is believed, prove adequate to solve, without great difficulty, the cases in which the parties have not, by their express contract, put the existence of a special deposit beyond the field of doubt.

In completion of the discussion of deposits of money, it is proper to point out the relation assumed between the customer and the bank, on a general deposit. It has been said that the special depositor remains the owner of the subject of deposit, whether moneys or chattels.[41] These never become the property of the bank and are not, therefore, assets for the payment of creditors in case of failure.[42] But the situation is entirely different in the case of a general deposit. The money deposited, if valid and legal money,[43] passes into the

uniformly held that, in the event of the insolvency of the bank of actual deposit, the claim of that bank against other banks for the redeposit, does not pass to the receiver for the benefit of creditors generally, but belongs at once to the public. Marquette v. Wilkinson (1899) 119 Mich. 413; In re Salmon (Dist. Ct. Mo. 1906) 145 Fed. 649, affirmed In re Blake (C. C. A. 8th Cir. 1906) 150 Fed. 279. These decisions seem inherently sound. The court in the latter case placed the liability upon the tort to the public arising out of the fraud in which the second bank participated. The difficulty with this view is, of course, one of proximate causation, since to render it applicable, it must be shown not only that the fraud induced the deposit in the insolvent bank, but that the failure, which was the real cause of the threatened loss, was connected in some manner with the fraud. However, the result was correct whether that view is applicable or not. The sub-deposit is made only for the purpose of making payments on account of the public withdrawals. This clearly identifies the right of the first bank against the second as to the converted form of the property which the public deposited in the former. Accordingly, when, on discovery of the fraud, the public exercises its undoubted right to rescind the transaction which passed title to the first bank, it is now possible to trace its property specifically. It may, therefore, be recovered without undue injustice to the other creditors of the insolvent.

In Henry County v. Citizen's Bank of Windsor (1907) 208 Mo. 209, 106 S. W. 622, the county failed because the facts did not show that the Citizen's Bank had received from the bank of actual deposit, any of the public funds or anything on that account. This is clearly distinguishable, and the court refused to hold the bank for damages as a joint tort-feasor.

[41] The obligation of the bank to return the identical coin or chattel is conclusive of this. Warren v. Nix (1911) 97 Ark. 374, 135 S. W. 896.

[42] Idem; 1 Bolles, Banking, 443.

[43] The deposit of counterfeit money, like that of forged paper, is a nullity. Although the ostensible value is placed to his credit, the depositor does not become a creditor of the bank. The reason is obvious. A deposit of such property is not a payment and goes for nothing. The handing over of counterfeit coins or forged paper would not

ownership of the bank.[44] The latter may do as it pleases with the money; pay its debts therewith; subject to its corporate power, give it away; use it as the basis of a circulation; redeposit it with other banks, and generally conduct a regular banking business by its aid.[45] The depositor is a creditor of the bank,[46] and as such,

discharge a debt; in like manner it cannot create a debt. Jones v. Ryde (1814) 5 Taunt. 488; Bank of United States v. Bank of Georgia (1825) 10 Wheat. 333; Corbit v. Bank of Smyrna (Del. 1837) 2 Harr. 235, 257; Wingate v. Neidlinger (1875) 50 Ind. 520; Willson v. Foree (1810) 6 Johns 110.

[44] "The relation of banker and customer in respect to deposits, is that of debtor and creditor. When deposits are received they belong to the bank as part of the general funds, and the banker becomes a debtor to the depositor, and agrees to discharge the indebtedness by paying the cheques of the depositor, his creditor. The contract between the parties is purely legal and has no element of trust in it." Allen, J., in Aetna Nat. Bank v. Fourth Nat. Bank (1878) 46 N. Y. 82. In Perley v. Muskegon County (1875) 32 Mich. 132, it is said, "It is well settled that, in the case of all but special deposits, the money deposited becomes the property of the banker, and he becomes the debtor of the depositor. No depositor can, upon refusal to pay a cheque, replevy or seize the funds in the bank. His redress must be as a creditor in some form of action to enforce his debt. Statutes sometimes give priority to peculiar debts, but, except in such cases, the depositor has no advantage over any other creditors."

[45] Grant, Banking (6th Ed.) 3, "To all intents money deposited is the money of the banker to do with as he may please, though in a popular sense, it is spoken of as 'my money at my banker's' or in words of similar import." Watts v. Christie (1849) 11 Beav. 546; Foley v. Hill (1848) 2 H. L. Cas. 28, 39; In re Agra Bank (1866) 10 Wall. 152; Thompson v. Riggs (1866) 5 Wall. 663; Carr v. Nat. Security Bank (1871) 107 Mass. 45, 48; Neeley v. Rood (1884) 54 Mich. 134. The bank is absolutely bound to pay the amount to the depositor, totally irrespective of what has been done with the money, or in what manner it may have been lost after receipt by the bank, Commercial Bank of Albany v. Hughes (1873) 17 Wend. 94. The rule is the same whether the deposit is to be repaid on demand or at a certain day. Williams v. Rogers (Ky. 1879) 14 Bush 776, 788. On common law principles, authorized deposits of public monies by public treasurers are indistinguishable in this respect from any other deposits, Perley v. Muskegon County (1875) 32 Mich. 132; note 30, supra.

[46] Warren v. Nix (1911) 97 Ark. 374, 135 S. W. 896; Steelman v. Atchley (1911) 98 Ark. 294, 135 S. W. 902; McGregor v. Battle (1907) 128 Ga. 577, 58 S. E. 28; Tyson and Rawles v. Western Nat. Bank (1893) 77 Md. 416; 26 Atl. 521 (obiter); State v. Clement Nat. Bank (1911) 84 Vt. 167, 78 Atl. 944.

While all courts uniformly declare the bank and its customer to be debtor and creditor, there is conflict whether that which joins them as such is or is not a loan. In Warren v. Nix, supra, an attempt was made to charge certain persons under statute making it unlawful for a public officer to loan any public funds in any manner whatsoever, but making it lawful to deposit the same in a bank for safekeeping. Frauenthal, J., said, "But we think there is a clear distinction between a loan and a general deposit. Where a loan is made, the money is borrowed for a fixed time, and the borrower promises to repay such amount at a fixed future date. But a general deposit is payable upon demand; in effect, the money thus deposited is kept under the control of the depositor, because it must be kept at all times subject to be paid upon his check. The depositor does not ordinarily understand that he is making a loan to the bank when he makes deposit therein. In Law's Est. (1891) 144 Pa. 499, 22 Atl. 831, a similar attempt was made to surcharge a trustee for lending the money of the trust, and alleging he had deposited the same in a reputable bank which had since failed. Clark, J., held that he was not chargeable, saying, "Whilst the relation between the depositor and his banker is that of debtor and creditor simply, the transaction cannot in any proper sense be regarded as a loan, unless the money is left, not for safe-keeping, but for a fixed period at interest, in which case the transaction assumes all the characteristics of

in case of failure, he takes a dividend from the assets of the insolvent estate *pari passu* with other creditors.[47] He is entitled to no preference, except by statutory provisions;[48] it is not a question of

a loan." The two weeks notice before withdrawal was regarded by the court, as only a reasonable provision and not inconsistent with a proper bank deposit by a trustee. In Allibone v. Ames et al (1896) 9 S. D. 74, 68 N. W. 165, the same conclusion was reached, in holding a county treasurer not liable, in generally depositing the county funds, for a violation of a constitutional and statutory prohibition against the lending of public money. Haney, J., "For some purposes (general) deposits are spoken of as equivalent to loans, because, like loans they create the relation of debtor and creditor. * * * If it is agreed that the money shall remain for a fixed period, there is a loan and not a deposit." The same view is taken in State v. McFetridge (1893) 84 Wis. 473, 54 N. W. 1, where the statute prohibited the investment. The fact that, in a deposit, the depositor does not lose control over the funds, but may reclaim them at any time, largely influenced the court in this case, and, in passing, it may be said that this is the general ground upon which all the above cases are really rested. In fact, the court might well dispose of them by saying that the statutory or common law prohibition is not intended to include instances of the surrender of title to trust money where the full control or ability to secure the immediate repayment is retained, and, at the same time, safety is secured. It appears to the writer beyond question, that the extent of control retained is the real issue in this class of semi-criminal cases, and that it would be well for the courts openly to recognize that fact, and to say the statutes should be construed in view of the conditions for which they were intended to provide. Thus in Salway v. Salway (1831) 2 Russ. & M. 215, a trustee deposited under an arrangement that his cheques were to be honored only when countersigned by another. Lord Brougham surcharged him. "Consider the position of the fund, had a sudden run come upon the bank. White, on hearing of it, would be bound instantly to withdraw the whole balance; but the arrangement which he had made prevented him from doing this, without the concurrence of Anderson, who lived at some distance." So in Law's Estate, supra, the question was largely whether the requirement of two weeks' notice of withdrawal left to the trustee a reasonable amount of control. Likewise in Appeal of Baer (1889) 127 Pa. 360, 18 Atl. 1, where the money was deposited repayable after one year, the transaction was held a loan, and the administrator chargeable for the loss as an illegal investment upon personal security.

The distinction taken in the above cases was approved in Nebraska v. First Nat. Bank (1898) 88 Fed. 947, 948; Officer v. Officer (1903) 120 Iowa 389, 392. However, in Independent District of Boyer v. King (1890) 80 Iowa 497, 500, Robinson, J., speaking of a general deposit says: "The transaction creates the relation of debtor and creditor, and is, in effect, a loan by the depositor to the banker." In this case there was no reason for distinguishing between a loan and the result of a general deposit.

For a collection of cases both holding a deposit to be a loan, and distinguishing between them, see 2 Words & Phrases, 1998-9. It is believed all these authorities can be reconciled on the principle above stated. Clearly a general deposit is a loan. It could hardly be anything else, and the cases attempting to make the distinction confuse the bailment, or depositum, with the modern general deposit which passes title to the bank. There is no legal incongruity between a right to repayment on demand and a loan. Bankers' "call loans" are none the less loans because they may be "called" at any time. The principle of retention of control seems the correct one.

[47] In re Franklin Bank (1828) 1 Paige, Ch. 249. Cf. Threlfal v. Giles, cited in Sadler v. Belcher, 2 Moody & Rob. 489, at p. 492: See Ex parte Clutton (1850) 1 Fonb. 167, showing that custom may affect the question.

[48] In respect to insolvent National Banks, see Rev. Stat. 5236, Act June 3, 1864, c. 106, § 50 (13 Stat. at L. 115) giving preference only to claims of the United States for deficiencies in the funds to redeem the notes of the insolvent. All other claims are entitled to a ratable dividend, which includes a claim for damages by reason of the failure of a bank to deliver a special deposit which cannot be traced. Turner v. First

following his property, for it has ceased to be his property, and his sole right is that of a claimant against his debtor. The depositor, therefore, has no equity which gives him a right over and above other creditors.

There remains but one exceptional case to be considered in concluding this discussion of money deposits. When, to the knowledge of the officers of a bank,[49] the bank is insolvent,[50] and being so, re-

Nat. Bank (1869) 26 Iowa 562. State Statutes giving preferences in cases of insolvency, and inconsistent with National Banking Act do not apply. Davis v. Elmira Sav. Bk. (1896) 161 U. S. 275.

[49] The banker must have knowledge of the insolvency and an honest but mistaken belief by the banker in the solvency of the bank at the time of receiving the deposit, is fatal to the right to recover the full deposit from the receiver or assignee. These views are clearly expressed by Ingrahm, J., in William v. Van Norden Tr. Co. (N. Y. 1905) 104 App. Div. 251, "The right of the plaintiff to rescind the contract which had resulted in vesting the Clarkes with the title to the cheque or its proceeds is based upon fraud. The fraud relied upon is based upon the receipt of the Clarkes of this deposit from the plaintiff when they were insolvent, such insolvency being known to the Clarkes at the time they received the deposit. * * * It is fraud that must be proved. An honest mistake as to the condition of the bank and an honest belief in the solvency of the institution, if it exists, negative the conclusion of the fraud upon which the plaintiff's cause of action must depend."

The same is true in criminal prosecutions under statutes punishing the receipt of deposits while insolvent. Commonwealth v. Junkin (1895) 170 Pa. 194, 199. It is not necessary to multiply authorities upon either proposition. Since, as stated in the text, the civil right to recover the deposit in full depends upon fraud and the consequent right to rescind the contract which passed title to the bank, knowledge of insolvency is a necessary part of the proof of scienter. Brooks v. Bigelow (1886) 142 Mass. 6.

But knowledge of the bank or its agents need not be proved by direct evidence, as admissions. It may be presumed from all the circumstances of the case, and where it appears that the bank had actually been insolvent for some time previous, though still open for business, the presumption becomes practically conclusive, for such circumstances make it impossible that they remained ignorant of the situation to its affairs, which they cannot be heard to allege. Craigie v. Hadley (1885) 99 N. Y. 131, 135. An agent's knowledge of the insolvency is imputable to the bank. This is clear upon general agency principles. St. Louis, etc. Ry. Co. v. Johnson (1889) 133 U. S. 566.

[50] The existence of insolvency is a question of fact. "Insolvency is that condition of affairs in which a merchant or business man is unable to meet his obligations as they mature in the usual course of business." 2 Morse, Banking (4th Ed.) 623. In Anonymous (1876) 67 N. Y. 598, the distinction was taken between a trader who had become embarrassed and insolvent, and yet has reasonable hopes that by continuing in business he may retrieve his fortunes, in which case he may buy goods on credit, making no false representations, without the necessary imputation of dishonesty; and the trader who was hopelessly insolvent, knowing that he could not pay his debts and that he must fail in business and thus disappoint his creditors. In Craigie v. Hadley (1885) 99 N. Y. 131, this distinction was applied to banks in this connection. Both the distinction and its application were unqualifiedly approved by the late Chief Justice Fuller in St. Louis etc. Ry. Co. v. Johnston (1889) 133 U. S. 566, 576, holding that in the case of a bank, where even greater confidence is asked and required, a still more rigid responsibility for good faith and honest dealing would be enforced. The same distinction, though in another connection, is taken by the late Justice Brewer in Sanford Fork & Tool Co. v. Howe Brown & Co., Ltd (1894) 157 U. S. 312.

For meaning of "insolvency" in statutes making it a criminal act for a private banker or a bank officer to receive deposits when known to be insolvent, see Case Note, 20 L. R. A. N. S. 444.

ceives deposits, that is such fraud on the part of the bank through its officers, as to enable the depositor to avoid the transfer of title to the bank,[51] and to recover it in full, provided he is able to trace his property into the hands of the receiver or comptroller.[52] The provision safeguards the rights of other creditors, and no injustice is done them, if the property is fully identified.

(To be Concluded.)

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[51] It has been said in some cases that money received by a bank, known by its officers to be insolvent, is received upon special deposit. But this seems not wholly inaccurate. The leading case on the subject is Craigie v. Hadley, supra, where Andrews, J., in discussing the principles upon which the right rests, points out that in the usual case, title to the subject of deposit made in the ordinary course is immediately vested in the bank; that the bank acquires title thereto on an implied agreement to pay an equivalent consideration when called upon by the depositor, and that one who has been induced to part with his property by the fraud of another, under the guise of a contract, may, upon discovery of the fraud, rescind the contract and reclaim the property, unless it has come into the possession of a bona fide holder.

"There need be no actual intent to defraud a particular customer; if he is, to his own knowledge, hopelessly insolvent, he will be held to have intended the natural consequences of his act, that is, to cheat and defraud all persons whose money he receives and whom he fails to repay before he is compelled to stop business." Fuller, C. J., in St. Louis etc. Ry. Co. v. Johnston, supra.

[52] This is the same problem as that already discussed in notes 32 and 39 supra. It is essential, not only that the depositor should be legally able to rescind the transaction by which he lost title to his property, but that he should now find his property in one form or other. Williams v. Van Norden Trust Co., supra. For a further discussion of the sufficiency of an identification, see 1 Mich. L. Rev. 241, and cases there cited.